No. 17-1471

In the Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

KENNETH S. GELLER
ARCHIS A. PARASHARAMI
Counsel of Record
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
aparasharami@mayerbrown.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Decision Below Is Inconsistent With CAFA's Clear Text And Purpose. 5

A. A newly added counterclaim defendant counts as "any defendant" entitled to remove a putative class action under CAFA. 6

B. The decision below frustrates CAFA's essential purpose of ensuring federal jurisdiction over interstate class actions. 11

II. The Question Presented Is A Recurring One Of Exceptional Importance. 16

III. This Court's Review Is Essential Because Only This Court Can Clarify The Limits Of Its Holding In *Shamrock Oil*. 20

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Ali v. *Fed. Bureau of Prisons*,
552 U.S. 214 (2008) 6, 7

Arkansas v. *Sanders*,
442 U.S. 753 (1979) 20

Bank of N.Y. Mellon v. *Cioffi*,
2016 WL 3962818 (D. Mass. July 21,
2016) 10

Cach, LLC v. *Echols*,
506 S.W.3d 217 (Ark. 2016) 17

Citibank, N.A. v. *Perry*,
2016 WL 6677944 (W.Va. Nov. 10,
2016) 17

Citibank (South Dakota), N.A. v. *Duncan*,
2010 WL 379869 (M.D. Ala. Jan. 25,
2010) 17

Dart Cherokee Basin Operating Co.
v. *Owens*,
135 S. Ct. 547 (2014) 4, 10, 11, 20

Deutsche Bank Nat'l Trust Co. v. *Weickert*,
638 F. Supp. 2d 826 (N.D. Ohio 2009) 7

Epic Sys. Corp. v. *Lewis*,
--- S. Ct. ----, 2018 WL 2292444
(May 21, 2018) 19

Fidelity Fed. Bank & Trust v. *Kehoe*,
547 U.S. 1051 (2006) 20

TABLE OF AUTHORITIES—continued

Page(s)

Ford Motor Credit Co. v. *Calandra*,
2011 WL 2566076 (N.J. Super. Ct. App. Div. June 30, 2011) 17

Gonzaga Univ. v. *Doe*,
536 U.S. 273 (2002) 20

Harrison v. *PPG Indus., Inc.*,
446 U.S. 578 (1980) 6

HBSC Bank USA, N.A. v. *Arnett*,
767 F. Supp. 2d 827 (N.D. Ohio 2011) 17

Liberty Credit Servs. v. *Yonker*,
2010 WL 2639903 (N.D. Ohio June 29, 2010) 17

Manahawkin Convalescent v. *O'Neill*,
43 A.3d 1197 (N.J. Super. Ct. App. Div. 2012) 17

Midland Funding LLC v. *Hilliker*,
68 N.E.3d 542 (Ill. App. 2016) 17

Morse v. *Republican Party of Va.*,
517 U.S. 186 (1996) 13

In re Mortg. Elec. Registration Sys., Inc.,
680 F.3d 849 (6th Cir. 2012) 7, 8

Palisades Collections LLC v. *Shorts*,
552 F.3d 327 (4th Cir. 2008) ..... *passim*

Portfolio Recovery Associates, LLC v. *Dixon*,
366 P.3d 245 (Kan. App. 2016) 17

TABLE OF AUTHORITIES—continued

Page(s)

Portfolio Recovery Assocs., LLC v. *Houston*,
No. 12-CVD-642 (N.C. Gen. Ct. of Justice,
Iredell County, filed May 14, 2012) 17

In re Rhone-Poulec Rorer Inc.,
51 F.3d 1293 (7th Cir. 1995) 19

Shady Grove Orthopedic Assocs., P.A. v.
Allstate Ins. Co.,
559 U.S. 393 (2010) 19

Shamrock Oil & Gas Corp. v. *Sheets*,
313 U.S. 100 (1941) ..... *passim*

St. Vincent Charity v. *Paluscsak*,
No. 17CVF09866 (Ohio Cleveland
Municipal Court, filed Aug. 14, 2017) 17

Standard Fire Ins. Co. v. *Knowles*,
133 S. Ct. 1345 (2013) ..... *passim*

Stevens v. *Dep't of Treasury*,
500 U.S. 1 (1991) 16

Taylor v. *First Resolution Invest. Corp.*,
72 N.E.3d 573 (Ohio 2016) 17

Tri-State Water Treatment, Inc. v. *Bauer*,
845 F.3d 350 (7th Cir. 2017) 8, 21

Unifund CCR Partners v. *Harrell*,
509 S.W.3d 25 (Ky. 2017) 17

United Consumer Fin. Servs. Co. v. *Carbo*,
982 A.2d 7 (N.J. Super. Ct. App. Div.
2009) 17

TABLE OF AUTHORITIES—continued

Page(s)

United States v. *Gonzales*,
520 U.S. 1 (1997) 6

Wells Fargo Bank v. *Gilleland*,
621 F. Supp. 3d 545 (N.D. Ohio 2009) 17

West v. *Aurora City*,
73 U.S. 139 (1868) 8, 9

Westwood Apex v. *Contreras*,
644 F.3d 799 (9th Cir. 2011) 3, 8, 9

Statutes and Rules

28 U.S.C. § 1441(a) 7

28 U.S.C. § 1446(b) 14

28 U.S.C. § 1446(c) 15

28 U.S.C. § 1453(b) 4, 6, 15

CAFA § 2(a)(2) (28 U.S.C. § 1711 note) 11

CAFA § 2(a)(4) (28 U.S.C. § 1711 note) 11, 19

CAFA § 2(b)(2) (28 U.S.C. § 1711 note) 4, 12

Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 14

Fed. P Civ. P. 13(h) 7

Fed. R. Civ. P. 20(a)(1) 7

Fed. R. Civ. P. 20(a)(2) 4, 7

TABLE OF AUTHORITIES—continued

Page(s)

Miscellaneous

151 CONG. REC. H723-01 (daily ed. Feb. 17, 2005) 12

151 CONG. REC. S1086-02 (daily ed. Feb. 8, 2005) 12

BLACK'S LAW DICTIONARY (10th ed. 2014) 7

H.R. REP. NO. 49-1078 (1st Sess. 1887) 8

Lonny Sheikopf Hoffman, *Burdens of Jurisdictional Proof*, 59 Ala. L. Rev. 409 (2008) 2, 16

Nathan A. Lennon, *Two Steps Forward, One Step Back: Congress Has Codified The* Tedford *Exception, But Will Inconsistent Applications Of "Bad Faith" Swallow The Rule?*, 40 N. Ky. L. Rev. 233 (2013) 15, 18

Remarks on Signing the Class Action Fairness Act of 2005, 41 WEEKLY COMP. PRES. DOC. 265 (Feb. 18, 2005) 13

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 19

S. REP. NO. 109-14 (2005) 4, 12, 18, 19

Anthony J. Sebok, *What Do We Talk About When We Talk About Mass Torts?*, 106 Mich. L. Rev. 1213 (2008) 16

Tr. of Oral Arg., *Standard Fire Ins. Co.* v. *Knowles*, 2013 WL 67701 (Jan. 7, 2013) 14

TABLE OF AUTHORITIES—continued

Page(s)

Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193 (2007) 15, 17, 18

Don Zupanec, *Palisades Collections LLC* v. *Shorts*, 24 FED. LITIGATOR 7 (Feb. 2009) 17

INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit corporation with 90 corporate members representing a broad cross-section of American industry. (A current list of PLAC's corporate members can be found at https://plac.com/PLAC/Who_We_Are/Membership/PLAC/Membership/Corporate%20Membership.aspx.) These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed over 1,100 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product manufacturers.

PLAC's corporate members are frequently defendants in class actions and other mass proceedings. PLAC's members have a strong interest in this

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

case because the court of appeals' decision erroneously construes this Court's decision in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100 (1941), interpreting the general removal statute to in turn endorse an interpretation of the Class Action Fairness Act that conflicts with both its text and purpose. The decision below thus allows plaintiffs to avoid federal jurisdiction over important, interstate class actions that Congress intended to be heard in federal court by the simple expedient of provoking a collection action by non-payment and then bringing the class action as a counterclaim instead of an independent lawsuit. That approach denies businesses—including many of PLAC's members—the very access to federal courts that Congress sought to provide in enacting CAFA. And only this Court can correct the misunderstanding of *Shamrock Oil* that has led to this result.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below is the latest in a long pattern of cases in which the lower courts have misapprehended a critical and recurring question under the Class Action Fairness Act of 2005 (CAFA). That statute, intended to move significant interstate class actions into federal court, has been described as "the most significant legislative reform of complex litigation in American history." Lonny Sheikopf Hoffman, *Burdens of Jurisdictional Proof*, 59 Ala. L. Rev. 409, 410 (2008).

Here, following the Fourth Circuit's earlier split decision in *Palisades Collections LLC* v. *Shorts*, 552 F.3d 327 (4th Cir. 2008), and similar decisions from the Sixth, Seventh, and Ninth Circuits, the court below concluded that a defendant that was newly added to an individual collections action as the target of

an interstate class action seeking millions of dollars was foreclosed from removing the lawsuit to federal court because the class action was pleaded as a counterclaim. It is undisputed that the very same claim could be removed to federal court under CAFA if it were pleaded as an independent action.

The lower courts have felt compelled to reach this peculiar result by this Court's decision in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100 (1941), concluding that *Shamrock Oil* stands for the proposition that only an originally-named defendant in a case has a right to remove the case to federal court. But that overbroad interpretation finds no support in the actual holding of *Shamrock Oil*, which is that an original *plaintiff* who *chooses* a state forum cannot remove a civil action to federal court under the (more restrictive) general removal statute when later named as a counterclaim defendant. *Id.* at 108-09. Alternatively, at a minimum, as Judge Niemeyer put it in his comprehensive *Palisades* dissent, "*Shamrock Oil* [is] inapplicable in the CAFA context." *Palisades*, 552 F.3d at 344 (Niemeyer, J., dissenting); see also *Westwood Apex* v. *Contreras*, 644 F.3d 799, 808 (9th Cir. 2011) (Bybee, J., concurring) ("We extend *Shamrock Oil* today, but ironically we have no occasion to reflect on whether *Shamrock Oil*'s rationale warrants its extension.").

This Court's review is therefore needed to correct these lower court decisions misapprehending *Shamrock Oil*'s holding and improperly extending it to CAFA removals in conflict with that statute's text and purpose. Congress enacted CAFA with the "primary objective" of "ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co.* v. *Knowles*, 133 S.

Ct. 1345, 1350 (2013) (quoting CAFA § 2(b)(2) (codified at 28 U.S.C. § 1711 note)). Toward that end, CAFA expanded diversity jurisdiction and eliminated prior strictures on removal practice. As this Court recently emphasized, CAFA's "provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Dart Cherokee Basin Operating Co.* v. *Owens*, 135 S. Ct. 547, 554 (2014) (quoting S. REP. NO. 109-14, at 43 (2005)).

As Judge Niemeyer has explained, the lower courts' cramped interpretation of CAFA is "demonstrably at odds" with the statute's "plain language," which authorizes "'*any* defendant'" to remove. *Palisades*, 552 F.3d at 338, 339 (Niemeyer, J., dissenting) (quoting 28 U.S.C. § 1453(b)). A newly-added counterclaim defendant qualifies as "any defendant" under the plain meaning of those words: like petitioner here, such a defendant is haled into court involuntarily to defend an action for relief against it. See also Fed. R. Civ. P. 20(a)(2) (treating persons as "Defendants" "if * * * any right to relief is asserted against them"). There is no logical or textual reason why such a defendant's access to federal court should turn on the happenstance of whether the putative class action against it is brought as a counterclaim. Indeed, the rule adopted below runs headlong into this Court's admonition not to "exalt form over substance" when interpreting CAFA's provisions. *Standard Fire*, 133 S. Ct. at 1350.

Moreover, while Congress enacted CAFA to ensure that plaintiffs' lawyers cannot manipulate pleadings to keep a class action in state court, the decision below invites them to do just that, simply by filing the class action as a counterclaim—for exam-

ple, to a collection action that a consumer deliberately provokes—rather than a stand-alone suit.

Finally, the question presented—whether plaintiffs' lawyers may circumvent an important federal statute through a pleading device—is a recurring one of great consequence. As the practices that led to CAFA's enactment amply demonstrate, plaintiffs' lawyers have proven themselves adept at exploiting loopholes—including the loophole that is the subject of the petition, as PLAC's own members have experienced. Class counsel can be expected to take advantage of every opportunity to keep cases in magnet state courts that apply lax class-certification standards, thus increasing—perhaps dramatically—the likelihood of a "blackmail" settlement that defendants must pay (whether the case is meritorious or not) to guard against the risk of an outsized class-wide judgment. And lower courts, including the Fourth and Seventh Circuits, have explicitly noted that only this Court can close the CAFA loophole that the petition addresses.

This Court's review is therefore essential.

ARGUMENT

I. The Decision Below Is Inconsistent With CAFA's Clear Text And Purpose.

The interpretation of CAFA adopted by the Fourth Circuit is wrong for two independent reasons. First, in authorizing removal by "any" defendant, CAFA unambiguously authorizes removal by a new *counterclaim* defendant. Second, even if the statutory text were ambiguous, CAFA calls for the ambiguity to be resolved in favor of a newly-added counterclaim defendant's right to remove. Any contrary interpretation would undermine the congressional ob-

jectives in enacting CAFA to create a federal forum for interstate class actions with relatively large amounts at stake and to prevent plaintiffs' lawyers from defeating removal through manipulation of pleadings.

A. A newly added counterclaim defendant counts as "any defendant" entitled to remove a putative class action under CAFA.

1. CAFA's removal provision, 28 U.S.C. § 1453(b), states that a class action "may be removed by any defendant." As this Court has observed, a statutory phrase introduced by the word "any" is ordinarily interpreted to have "a broad meaning." *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 218-19 (2008); accord *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980). "[R]ead naturally," the word "any" means "one or some indiscriminately of whatever kind." *Ali*, 552 U.S. at 219 (quotation marks omitted).

Following this Court's guidance in *Ali* and prior cases, Judge Niemeyer concluded in his *Palisades* dissent that the "plain language" of CAFA "unambiguously grants [a counterclaim defendant] removal authority" and "clearly provides" that an "interstate class action" like the one here may "proceed in federal court." *Palisades*, 552 F.3d at 342, 345 (Niemeyer, J., dissenting).[2] Specifically, he recognized that a

---

[2] While Judge Niemeyer was bound by circuit precedent to join the panel opinion below, he had previously expressed the view that "only the Supreme Court can * * * rectify" the Fourth Circuit's "unfortunate" interpretation of CAFA and *Shamrock Oil*. *Palisades*, 552 F.3d at 345 (Niemeyer, J., dissenting from the denial of rehearing en banc); see also pages 20-21, *infra*.

newly added "*counterclaim* defendant is certainly a 'kind' of defendant and falls easily within 'indiscriminately of whatever kind' of defendant." *Palisades*, 552 F.3d at 339 (quoting *Ali*, 552 U.S. at 219); see also *Deutsche Bank Nat'l Trust Co.* v. *Weickert*, 638 F. Supp. 2d 826, 829 (N.D. Ohio 2009) (agreeing with Judge Niemeyer's analysis "that CAFA expanded removal authority to include parties added as counterclaim defendants to a class action").[3]

That conclusion accords with the plain meaning of "defendant" as simply a "person [or entity] sued in a civil proceeding." BLACK'S LAW DICTIONARY (10th ed. 2014). There can be no serious dispute that petitioner has been "sued in a civil proceeding" and must now face putative class-action claims leveled against it. And that conclusion likewise accords with the Federal Rules of Civil Procedure, with which Congress must be presumed to have been familiar in enacting CAFA. Rule 13(h) says that "Rules 19 and 20 govern the addition of a person as a party to a counterclaim," and Rule 20(a)(2), in turn, treats persons as "Defendants" "if * * * any right to relief is asserted against them." Compare Fed. R. Civ. P. 20(a)(1) (treating as "Plaintiffs" those persons who "assert any right to relief").

2. The court below, like the other circuits to consider this issue, have felt bound to give this peculiar reading to CAFA because of this Court's decision in *Shamrock Oil*. In the Fourth Circuit's view, *Shamrock Oil*'s interpretation of the language "the defendant or the defendants" in the general removal statute

---

[3] The Sixth Circuit subsequently sided with the *Palisades* majority. See *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853-54 (6th Cir. 2012).

(now 28 U.S.C. § 1441(a)) grants the right of removal under CAFA *only* to originally-named defendants in a case, even though CAFA uses the broader "any defendant" language. See Pet. App. 4a, 6a-7a, 11a; see also, *e.g.*, *Tri-State Water Treatment, Inc.* v. *Bauer*, 845 F.3d 350, 355 (7th Cir. 2017), cert. denied, 137 S. Ct. 2138 (2017); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d at 853; *Westwood Apex*, 644 F.3d at 805-06; *Palisades*, 552 F.3d at 332.

But that judicial expansion of *Shamrock Oil* is unwarranted. The entire rationale for the *Shamrock Oil* decision was that it would be unfair to allow the original *plaintiff*, as the party that had chosen to litigate in state court, to remove the case to federal court once named as a counter-claim defendant. *Shamrock Oil* framed the "question for decision" as "whether the suit in which the counterclaim is filed, is one removable *by the plaintiff* to the federal district court." 313 U.S. at 103 (emphasis added). The Court explained that "the plaintiff, having *submitted himself* to the jurisdiction of the state court, was not entitled to avail himself of a right of removal." *Id.* at 106 (emphasis added). Quoting the legislative history in which Congress had eliminated a prior provision allowing "either party" to remove, the Court emphasized that the reason the modified statute restricted the right to remove to "the defendant" was that Congress believed it to be "just and proper to require the plaintiff to *abide his selection* of a forum" and that, if the plaintiff "*elects* to sue in a State court when he might have brought his suit in a Federal court," there was "no good reason to allow him to remove the cause." *Id.* at 106 n.2 (emphasis added); (quoting H.R. REP. NO. 49-1078, at 1 (1st Sess. 1887)). And the *Shamrock Oil* Court relied (313 U.S. at 105-06, 108) on its prior decision in *West* v. *Aurora*

City, 73 U.S. 139 (1868), which held that "[t]he right of removal is given only to a defendant who has not submitted himself to [the State court's] jurisdiction; not to an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State laws to a cross-action." *Id.* at 141.

The circumstances in *Shamrock Oil* bear no resemblance to the circumstances of a *new* counterclaim defendant dragged into state court for the first time to defend a class-action counterclaim (as petitioner was here). As Judge Niemeyer pointed out, *Shamrock Oil* "denied a [counterclaim] defendant *who was also a plaintiff* the authority to remove," *Palisades*, 552 F.3d at 340 n.3 (Niemeyer, J., dissenting) (emphasis added), and the holding of *Shamrock Oil* depended on the counterclaim defendant's original status as a *plaintiff*. But, "[o]ver time, the holding of *Shamrock Oil*—that an original plaintiff could not remove the case after a counterclaim was filed—transformed into a rule that only the original defendant could remove the case"—even though *Shamrock Oil* itself "does not compel" that transformation. *Westwood*, 644 F.3d at 807-08 (Bybee, J., concurring).

The differences between a *newly-added* counterclaim *defendant* and an *original plaintiff* who becomes a counterclaim defendant (the situation in *Shamrock Oil*) are especially important in the CAFA context. As Judge Niemeyer explained in *Palisades*, *Shamrock Oil*'s holding was based on the interpretation of the phrase "*the* defendant" in the statute at issue there, a predecessor to the general removal statute. *Palisades*, 552 F.3d at 340 (Niemeyer, J., dissenting). Because CAFA uses expansive language of "*any* defendant," by contrast, Congress could not have meant to incorporate *Shamrock Oil*'s interpre-

tation of different language that is more restrictive. In addition, although this Court has reserved judgment on "whether * * * a presumption [against removal] is proper in mine-run diversity cases," it has underscored "that no antiremoval presumption attends cases invoking CAFA." *Dart Cherokee*, 135 S. Ct. at 554. And as we discuss below (at 12-17), the rule adopted by the decision below thwarts CAFA's purposes in addition to its text.

Moreover, there are substantial reasons for this Court to curtail the application of *Shamrock Oil* to newly-added counterclaim defendants of *any* kind. Unlike the original plaintiff in *Shamrock Oil*, an added counterclaim defendant has *not* chosen the state forum, and is a full-blown defendant in every legal and practical sense—save (under the reasoning of the decision below and similar decisions) the right of removal to federal court.

As one court noted in (reluctantly) remanding a non-class action removed by an added counterclaim defendant, "[i]t is by no means clear that the prohibition against removal by additional counterclaim defendants is sensible or entirely fair." *Bank of N.Y. Mellon* v. *Cioffi*, 2016 WL 3962818, at *7 (D. Mass. July 21, 2016). That court continued: "Such a defendant, unlike an original plaintiff/counterclaim defendant, did not select the forum. Other types of defendants, such as an original defendant or a defendant added by plaintiff's amendment, have an opportunity to remove to a federal forum. It is at the very least illogical to deny that opportunity to an additional counterclaim defendant." *Ibid.* And the court further observed that "[a]n additional counterclaim defendant has been sued in the only meaningful sense of the word—he has been hauled into court in-

voluntarily and must defend an action for relief against him." *Id.* at *8 (quotation marks omitted).

B. The decision below frustrates CAFA's essential purpose of ensuring federal jurisdiction over interstate class actions.

Congress enacted CAFA in response to a decade's worth of "abuses of the class action device" by plaintiffs' lawyers (CAFA § 2(a)(2) (28 U.S.C. § 1711 note))—including the filing of important interstate class actions in state court. As this Court has recognized, the statute's "primary objective" is thus to "ensur[e] Federal court consideration of interstate cases of national importance." *Standard Fire*, 133 S. Ct. at 1350 (quotation marks omitted). That is why, as noted above, this Court has held that "no antiremoval presumption attends cases invoking CAFA." *Dart Cherokee*, 135 S. Ct. at 554. On the contrary: "CAFA's provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Ibid.* (quotation marks omitted).

As the petition persuasively details (at 16-22), the decision below—and similar decisions from the Sixth, Seventh, and Ninth Circuits—cannot be squared with this Court's directive to interpret CAFA's provisions broadly and in favor of removal.

1. The text of CAFA sets forth the "finding[]" of Congress that "there have been abuses of the class action device" that have "undermine[d] the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction," in that class-action counsel have been "keeping cases of na-

tional importance out of Federal court." CAFA §§ 2(a)(2), 2(a)(4)(A) (28 U.S.C. § 1711 note). Consistent with that finding, one of the legislative "purposes" set forth in the statute is to "provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2) (28 U.S.C. § 1711 note); accord *Standard Fire*, 133 S. Ct. at 1350.

The Senate Judiciary Committee's Report includes more detailed findings. The Report observes that prior law enabled lawyers to "'game' the procedural rules" by "manipulat[ing] their pleadings" to keep class actions in state court—for example, by adding parties to defeat complete diversity or alleging that no individual class member was seeking damages above the jurisdictional threshold. S. REP. NO. 109-14, at 4, 26. The Report explains that CAFA addresses these problems by amending the law to ensure that interstate class actions can be litigated in "the proper forum—the federal courts," where the Committee "firmly believes" such actions belong. *Id.* at 5.

While CAFA was being debated, virtually every sponsor of the legislation—in both Houses, and of both parties—expressed the same view.[4] And the

---

[4] See, *e.g.*, 151 CONG. REC. S1086-02, 1099 (daily ed. Feb. 8, 2005) (statement of Sen. Kohl) ("Our bill attempts to * * * ensure that cases with a national scope are heard in Federal court."); *id.* at 1105 (statement of Sen. Grassley) ("[CAFA] will allow nationwide class actions to be heard in a proper forum, the Federal courts."); 151 CONG. REC. H723-01, 726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("The bill before the House today offers commonsense procedural changes that will end the most serious abuses by allowing more interstate class actions to be heard in Federal courts.").

President made a similar point when he signed the Act into law.[5]

2. Congress enacted CAFA to prevent precisely the type of situation that the decision below permits, indeed encourages.

There is no dispute that the putative class action here satisfies CAFA's jurisdictional requirements (*i.e.*, minimal diversity and an amount in controversy of more than $5 million). It would therefore have been removable if it had been filed as a freestanding suit.

The consequence of the decision below is that a putative class action that seeks millions of dollars on behalf of thousands of class members may be removed if it is pleaded as an independent action but not, as in this case, if it is pleaded as a "counterclaim" to an individual collections suit brought by a different party. Congress could not have intended to enable plaintiffs' lawyers to circumvent CAFA through the simple expedient of recruiting a defendant in a state-court action to serve as a "counterclaim plaintiff" in an otherwise-removable class action, or even deliberately provoking a simple collection action as a pretext to launch such a class-wide claim. And courts should not "interpret[] th[e] Act as containing a loophole that Congress could not have intended to create." *Morse* v. *Republican Party of Va.*, 517 U.S. 186, 239 (1996) (Breyer, J., concurring in the judgment).

---

[5] See Remarks on Signing the Class Action Fairness Act of 2005, 41 WEEKLY COMP. PRES. DOC. 265, 266 (Feb. 18, 2005) ("[CAFA] moves most large, interstate class actions into Federal courts. This will prevent trial lawyers from shopping around for friendly local venues.").

Indeed, members of this Court have recognized that CAFA cannot be read to permit similar gamesmanship. In posing a question to the respondent's counsel at oral argument in *Standard Fire*, Chief Justice Roberts identified the mischief that could occur if plaintiffs' lawyers were permitted to artificially manipulate their pleadings to circumvent CAFA—there, to avoid CAFA's $5 million amount-in-controversy requirement. He posited that a plaintiffs' lawyer might bring a "$4 million" class action in one state court on behalf of people "whose names begin with A to K" and bring another $4 million class action "in the next county" on behalf of those "whose named begin L to Z." Tr. of Oral Arg., *Standard Fire Ins. Co.* v. *Knowles*, 2013 WL 67701, at *29 (Jan. 7, 2013). When counsel responded that such a "legal strategy is perfectly appropriate" "for federal jurisdiction purposes" (*id.* at *29-30), Justice Breyer—who ultimately authored the opinion—reacted that such strategies create "a loophole" that "swallows up all of Congress's statute" (*id.* at *30). The result, he continued, would be that "we have 30 or 40 or $50 million cases being tried in whatever counties Congress liked the least." *Id.* at *30-31.

Further, this congressional purpose of preventing plaintiffs' lawyers from undermining removal through jurisdictional manipulations appears even outside of CAFA. For example, in the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758, Congress amended 28 U.S.C. § 1446 to put a stop to manipulation of removal deadlines by plaintiffs' lawyers. The statute now gives "[e]ach defendant" the opportunity to remove within "30 days after service" on it (28 U.S.C. § 1446(b))—rather than holding all defendants, even those never or belatedly served by plaintiffs as a tac-

tical maneuver, to a single 30-day clock upon service of the first defendant.[6] And the statute also codified a "bad faith" equitable exception to the one-year bar to removal of a standard diversity case. *Id.* § 1446(c)(1).[7]

As one commentator has noted, such manipulative tactics are of a piece with "new and creative tactics" adopted by "class action plaintiffs * * * to avoid the reforms" of CAFA—including the filing of "counterclaim class action[s]." Nathan A. Lennon, *Two Steps Forward, One Step Back: Congress Has Codified The* Tedford *Exception, But Will Inconsistent Applications Of "Bad Faith" Swallow The Rule?*, 40 N. Ky. L. Rev. 233, 237-38 (2013). And even an academic advocate of the counterclaim-class-action tactic acknowledges that the choice between filing a qualifying class action as an independent suit and filing it as a counterclaim depends upon whether class counsel "wishes to litigate in federal or state court." Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193, 197 (2007).

But the whole point of CAFA is that it is the class-action *defendant* that gets to decide whether to litigate a qualifying case in federal or state court. This Court's review is therefore essential to correct lower courts' narrow reading of CAFA that, if allowed to stand, would permit plaintiffs' lawyers to

---

[6] This amendment makes clear that Congress intended for each defendant newly haled into court to have its own opportunity to remove, even outside the CAFA context.

[7] That one-year limitation does not apply to CAFA cases. See 28 U.S.C. § 1453(b).

litigate interstate class actions in state court—contrary to CAFA's primary purpose of "ensuring Federal court consideration of interstate cases of national importance." *Standard Fire*, 133 S. Ct. at 1350 (quotation marks omitted).

* * *

In short, the text and purposes of CAFA—as well as the practical reasons why a newly-added counterclaim defendant should be treated like "any [other] defendant" for purposes of CAFA removal under Section 1453—warrant this Court's correction of "a clear misreading by the lower courts of [this] *** important federal statute." *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 5 (1991).

II. The Question Presented Is A Recurring One Of Exceptional Importance.

The question presented is important for the same reasons that the decision below is wrong: its interpretation undermines both CAFA's text and basic purpose. By allowing plaintiffs' lawyers to manipulate their pleadings to keep class actions in state court, the Fourth Circuit's decision has further ratified the very tactic that CAFA was enacted to prevent. CAFA has been described as "the most significant legislative reform of complex litigation in American history." Hoffman, *supra*, at 410. CAFA has also been described more generally as "arguably the most important tort reform in recent years." Anthony J. Sebok, *What Do We Talk About When We Talk About Mass Torts?*, 106 Mich. L. Rev. 1213, 1216 n.14 (2008).

Moreover, recent years have borne out the prediction of the academic proponent of such actions that the handful of cases brought prior to *Palisades*

were "just the tip of an approaching iceberg." *Tidmarsh, supra*, at 199; see also Don Zupanec, *Palisades Collections LLC* v. *Shorts*, 24 FED. LITIGATOR 7 (Feb. 2009) (describing the use of counterclaim class actions as "an increasingly frequent scenario"). As the petition points out, the same tactic employed in this case has been replicated in numerous other recent cases—with the petition listing over half a dozen examples from just the last *nine months*. Pet. 23-24 & n.*. And a brief, informal inquiry of PLAC's members has yielded several additional examples of counterclaim class actions. See, *e.g.*, Answer and Counterclaim, *St. Vincent Charity* v. *Paluscsak*, No. 17CVF09866 (Ohio Cleveland Municipal Court, filed Aug. 14, 2017); *Manahawkin Convalescent* v. *O'Neill*, 43 A.3d 1197 (N.J. Super. Ct. App. Div. 2012); Answer and Counterclaim, *Portfolio Recovery Assocs., LLC* v. *Houston*, No. 12-CVD-642 (N.C. Gen. Ct. of Justice, Iredell County, filed May 14, 2012); *Ford Motor Credit Co.* v. *Calandra*, 2011 WL 2566076 (N.J. Super. Ct. App. Div. June 30, 2011); *United Consumer Fin. Servs. Co.* v. *Carbo*, 982 A.2d 7 (N.J. Super. Ct. App. Div. 2009).[8]

---

[8] For still more examples, see also, *e.g.*, *Unifund CCR Partners* v. *Harrell*, 509 S.W.3d 25 (Ky. 2017); *Midland Funding LLC* v. *Hilliker*, 68 N.E.3d 542 (Ill. App. 2016); *Cach, LLC* v. *Echols*, 506 S.W.3d 217 (Ark. 2016); *Portfolio Recovery Associates, LLC* v. *Dixon*, 366 P.3d 245 (Kan. App. 2016); *Citibank, N.A.* v. *Perry*, 2016 WL 6677944 (W.Va. Nov. 10, 2016); *Taylor* v. *First Resolution Invest. Corp.*, 72 N.E.3d 573 (Ohio 2016); *HBSC Bank USA, N.A.* v. *Arnett*, 767 F. Supp. 2d 827 (N.D. Ohio 2011); *Liberty Credit Servs.* v. *Yonker*, 2010 WL 2639903 (N.D. Ohio June 29, 2010); *Citibank (South Dakota), N.A.* v. *Duncan*, 2010 WL 379869 (M.D. Ala. Jan. 25, 2010); and *Wells Fargo Bank* v. *Gilleland*, 621 F. Supp. 3d 545 (N.D. Ohio 2009).

The prevalence of counterclaim class actions like this one is unsurprising. As a practical matter, plaintiffs' attorneys will have little trouble finding debt collection proceedings or other small-scale litigation to serve as a vehicle for bringing such cases. Indeed, if need be, plaintiffs' attorneys could simply engineer the requisite initial proceeding by, for example, having a potential counterclaim plaintiff located in a "magnet" state court jurisdiction fail to pay certain bills and thus provoke a collections action. Bolstered by decisions like the one below and publications advertising the practice, plaintiffs' attorneys have ample opportunity to "avoid the reforms" of CAFA by filing "counterclaim class actions." Lennon, *supra*, at 237-38; Tidmarsh, *supra*, at 197-99.

The harms presented by these counterclaim class actions are compounded by the inevitability of coerced settlements following class certification in state court, which is precisely what CAFA was enacted to prevent. The legislative history shows that Congress was concerned about the "common abuse" by plaintiffs' lawyers of filing meritless class actions in state court "as 'judicial blackmail'" to extract sizable settlements from corporate defendants. S. REP. NO. 109-14, at 20; see also *id.* at 21 ("Not surprisingly, the ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions."). And the Report echoed Judge Posner's sentiment that certification of a class action in even meritless cases places defendants "'under intense pressure to settle,'" because "'certification of a class action, even one lacking merit, forces defendants to stake their companies on the outcome of a single jury

trial.'" *Id.* at 21 (quoting *In re Rhone-Poulec Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995)).[9]

In other words, class certification is often the main event in a putative class-action case, and Congress enacted CAFA specifically to allow defendants to avoid the lax certification standards employed by some state courts. Congress found that state-court judges frequently apply procedural rules "in a manner that contravenes basic fairness" (S. REP. NO. 109-14, at 4); class-action lawyers often "effectively control the litigation" in state court (*ibid.*); and state courts sometimes "act[] in ways that demonstrate bias against out-of-State defendants" (CAFA § 2(a)(4) (28 U.S.C. § 1711 note)).

Finally, even apart from the growing number of cases in which the question presented arises, the issue is sufficiently important to warrant this Court's immediate intervention. By the very nature of the issue, there is a large amount of money at stake—at least $5 million (the jurisdictional threshold) in every case—and, as just discussed, there is generally a higher probability of coercive settlement when a case remains in state court. "Th[e] enormous potential liability, which turns on a question of federal statutory

---

[9] See also, *e.g.*, *Epic Sys. Corp.* v. *Lewis*, --- S. Ct. ----, 2018 WL 2292444, at *16 (May 21, 2018) (observing that it is "well known" that class actions "can unfairly 'plac[e] pressure on the defendant to settle even unmeritorious claims'" if a class is certified) (alteration in original; quoting *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting)); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial.").

interpretation, is a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., joined by Alito, J., concurring).

III. This Court's Review Is Essential Because Only This Court Can Clarify The Limits Of Its Holding In *Shamrock Oil*.

Finally, as the petition explains, this Court's review is essential because the lower courts have misconstrued CAFA precisely because they have felt compelled by this Court's opinion in *Shamrock Oil*. This Court alone has the power to clarify the much-needed limits on that decision's reach. See Pet. 10-16. Cf. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 278 (2002) (granting review in part to "resolve any ambiguity in [this Court's] own opinions"); *Arkansas* v. *Sanders*, 442 U.S. 753, 754 (1979) (granting review "to resolve some apparent misunderstanding as to the application of" a prior decision of this Court), abrogated by *California* v. *Acevedo*, 500 U.S. 565 (1991).

For example, although he disagreed with the *Palisades* majority's extension of *Shamrock Oil* to the CAFA context, Judge Niemeyer also noted in his opinion dissenting from the denial of rehearing en banc in that case that "only the Supreme Court" has the power to "rectify" lower courts' erroneous interpretation of *Shamrock Oil* (and therefore CAFA as well). 552 F.3d at 345. Similarly, in rejecting the argument that this Court's opinion in *Dart Cherokee* undermined the extension of *Shamrock Oil* into the CAFA context, the Seventh Circuit remarked that "[i]f that is where the Supreme Court is going, it will have to get there on its own; it is not for us to antici-

pate such a move." *Tri-State Water Treatment*, 845 F.3d at 356; accord Pet. App. 11a (quoting same).

Accordingly, a conflict among the circuits is not likely to develop. This Court should grant the petition and take up these invitations to clarify the scope of *Shamrock Oil* in order to fix the "unfortunate loophole in the Class Action Fairness Act" that has resulted from lower courts' expansive misinterpretation of that decision's reach. *Palisades*, 552 F.3d at 345 (Niemeyer, J., dissenting from the denial of rehearing en banc).

* * *

In short, review is plainly warranted here. The lower courts' erroneous reading of a Supreme Court decision has led to the weakening of an important federal statute that threatens nationwide harm.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH S. GELLER
ARCHIS A. PARASHARAMI
Counsel of Record
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
aparasharami@mayerbrown.com

Counsel for Amicus Curiae

MAY 2018